

**FOR IMMEDIATE RELEASE**  
**Thursday, October 11, 2007**

**R-2644**  
**202/273-1991**  
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**NLRB MODIFIES RULE IN BACKPAY CASES CONCERNING  
EVIDENCE OF EMPLOYEES' JOB SEARCH EFFORTS**

In *St. George Warehouse*, 351 NLRB No. 42, the National Labor Relations Board, by a 3-2 vote, modified its procedures in backpay cases. Under the new rule, the General Counsel will have the burden of producing evidence concerning employees' efforts to find interim employment after an unlawful discharge.

In a prior proceeding, the Board found that St. George Warehouse, which operates a warehousing facility in Kearney, New Jersey, violated the National Labor Relations Act by discharging two employees because of their union activities. The Board ordered St. George Warehouse to remedy those unfair labor practices by reinstating the two employees and paying them back wages and benefits. A Board administrative law judge then conducted a compliance, or backpay, proceeding to determine the amount of backpay owing.

In a backpay proceeding, the burden to prove a reasonable amount of gross backpay is on the Board's General Counsel, who prosecutes cases before the Board. That amount is then reduced by the employees' interim earnings from the time of their discharge to the date the employer offered them reinstatement, a figure usually derived from social security data. The employer may seek to reduce that net backpay amount further by showing, among other things, that the employees had not sought to mitigate damages by making reasonable efforts to find interim employment. Under prior Board law, the employer bore the burden of production and persuasion with respect to that affirmative defense.

In its decision in this case, the Board reaffirmed the principle that the employer bears the ultimate burden of persuasion concerning whether an unlawfully discharged employee made an adequate search for interim employment. But the Board determined that, once the employer shows that there were comparable jobs available in the relevant geographic area, the burden of production "is properly on the discriminatee and the General Counsel . . . to show that the discriminatee took reasonable steps to seek those jobs." To meet this burden of production, the General Counsel must produce the employee to testify or offer other competent evidence of the employee's interim job search.

The Board majority (Chairman Battista and Members Schaumber and Kirsanow) based their decision on the “mixed” reception the Board’s prior rule received in the courts of appeals and on the General Counsel’s superior access to discharged employees and information regarding their job searches. The majority observed that its new rule is not burdensome to the General Counsel, who under existing internal guidelines routinely gathers evidence of job searches in employment discrimination cases likely to result in backpay.

The dissenters (Board Members Liebman and Walsh) asserted that the majority offered no persuasive reason for modifying the current procedure, which placed all aspects of the burden of proof to reduce backpay upon the wrongdoer. The dissenters observed that the existing rule had been followed for more than 40 years and that it was supported by the weight of judicial authority. In a separate dissent, Member Liebman called the majority’s action an “unfortunate” continuation of “the Board’s recent trend of weakening the backpay remedy under the National Labor Relations Act.”

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